LIBRARY
SUPREME COURT U S

Office - Supreme Court, U. S.
FILED
MAY 24 1949
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 298

October Term, 1948

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,
Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, AND CLYDE W. HENRY,
Respondents.

BRIEF OF H. C. HARPER, AS AMICUS CURIAE, BY SPECIAL PERMISSION OF THE COURT, IN SUPPORT OF PETITION FOR REHEARING

H. C. Harper,
Security Bank Building,
Sioux City, Iowa,
Attorney for Amicus Curiae.

Francis J. Parker,
P. O. Box 570,
Deadwood, South Dakota,

Robert B. Pike,
342 Davidson Building,
Sioux City, Iowa.
Of Counsel.

Law Brief—OMAHA LINO-SLUG PRINTING CO., 418 South 15th Street

INDEX

	Page
Opinions Below	1
Statement	2
Argument	3
I. The effect of the decision of this Honorable Court is to destroy the rights of the interested litigants in both the Eighth and Ninth Circuits without deciding that there was a conflict between the two Circuits upon which certiorari was granted. The Court has decided questions not raised by any petition or brief and which affect the vested rights of litigants	3
II. The decision of this Honorable Court is contradictory because in the first part of its opinion the Court sustains the categorical part of Public Law 109: "that no action shall abate," and holds that the Court should not make the additional language a "proviso," but in the latter part of the opinion commands the Court to dismiss any appeals on the merits if substitution was not made before July 1, 1946	6
III. The rule that dissolution of a corporation abates a pending action against the corporation is not applied in case of a merger and consolidation of a corporation with another corporation or on dissolution of a corporation, where the purpose of the merger or dissolution was to transfer the functions and assets of the one corporation to the other corporation together with an assumption of the liabilities by the transferee. Equitable considerations and public policy in such cases prevent abatement	8
IV. Under the laws of California and the State of South Dakota no surviving or continuing action abates by transfer of any interest, and revivor is a matter of right without any limitation of time. The State statute governs in the Federal Courts	10
V. Public Law 138 was not intended to repudiate any lawful debt or liability or to disturb any vested right	13
VI. A pendente assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned	14
VII. The word "shall" is ordinarily "the language of command," while the word "may" implies a "permissive" act as used in special contradistinction to the word "shall" used in a mandatory sense in the same legislative act	16

Pages

VIII. The decision of this Court is contrary to Rule 25c of the Federal Rules of Civil Procedure 19

IX. The language used in the statute does not require substitution 20

X. The liability of a named corporation under Public Law 109 was not extinguished under Public Law 109 21

Conclusion 21

CASES CITED

Anderson v. Youngkau, 329 U. S. 482 ..... 16, 17, 19

California Code of Civil Procedure (Deering 1937, Section 385) .. 19

Claussen v. Curran, 276 U. S. 500 ..... 7, 8

Cloquet Lbr. Co. v. Burns (8th Cir.), 222 Fed. 857, at page 862 ... 10, 12

Davis v. Rudolph (Cal.), 181 P. (2d) 765, at page 768 ..... 17, 19

Edison Elec. Lt. Co. v. U. S. Electric Lighting Co., 52 Fed. 300 at page 314 (9) 10

Edison Elec. Light Co. v. Westinghouse, 34 Fed. 232 at page 233 .. 10

Erie R. R. Co. v. Tompkins, 304 U. S. 817, at page 823 ..... 10, 12

Ex Parte Railroad, 95 U. S. 221 ..... 14, 15

Gaynor v. Metals Reserve Company, 166 F. (2d) 1011 ... 1, 2, 4, 13, 19, 20

Guaranty Trust Co. of N. Y. v. York, 326 U. S. 99, at page 113 ..... 10, 12

Hood, Com'r of Banks of N. Car., v. Bell (1st Cir.), 84 F. (2d) 136 ..... 16, 18

James & Co. v. Second Russian Ins. Co., 239 N. Y. 248, 254, 146 N. E. 369, 370 21

Klaxon v. Stentor Elec. Co., 313 U. S. 1020, at page 102 ..... 10, 12

LeCroue v. McAdoo, 253 U. S. 217 7

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, at p. 261 ..... 9, 10, 15

Payne v. Industrial Board, 258 U. S. 613 7

Troustine v. Bauer, Pogue & Co., 41 Fed. Supp. 767, at page 771 (7); affirmed, 144 Fed (2d) 379 (2nd Cir.) 21

Pages

United States ex rel. Johnson v. Morley Constr. Co. (2d Cir.) 98 F. (2d) 781, at page 785 ..... 10, 11, 19, 20

Westwater v. Murray (6th Cir.), 245 Fed. 427, at page 434 ..... 10, 12

Winslow v. Domestic Eng. Co., 20 F. Supp. 578 10

TEXTS CITED

Amer. Jur., p. 58, Sec. 55 8

1 Am. Jur., page 58, Section 55 9

1 C. J., p. 134, Sec. 214 8

1 C. J., page 134, Section 214 9

Cyclopedia of Federal Procedure, 1939 Supp., Section 1328, Note page 816 ..... 10, 19

STATUTES CITED

Note to Subdivision (c), Title 28, Rule 25c, U. S. C. A. 540) 19

Public Law 109 ..... 5, 6, 18

Rule 25c of the Federal Rules of Civil Procedure 19

Report of Hearing, Senate Journal Resolution 65, May 15, 1945, before Committee on Banking and Currency, U. S. Senate, U. S. Gov't Printing Office, May 15, 1945, bottom of p. 10 and top of p. 11 of said Report 5, 9

Section 33.0414, South Dakota Code of 1939 ..... 10, 11

Section 83, New York Civil Procedure Act, 1937 19

U. S. C. A., Title 28, Section 724 (Federal Conformity Act) 10, 13, 19

IN THE

Supreme Court of the United States

No. 298

October Term, 1948

DEFENSE SUPPLIES CORPORATION AND RECONSTRUCTION FINANCE CORPORATION,
Petitioners,

vs.

LAWRENCE WAREHOUSE COMPANY, CAPITOL CHEVROLET COMPANY, V. J. McGREW, AND CLYDE W. HENRY,
Respondents.

BRIEF OF H. C. HARPER, AS AMICUS CURIAE, BY SPECIAL PERMISSION OF THE COURT, IN SUPPORT OF PETITION FOR REHEARING

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit in the case of *Gaynor v. Metals Reserve Company* is reported in 166 F. (2d) 1011 and was filed on March 25, 1948. The opinion of the United States Court of Appeals for the Ninth Circuit in the within case is reported at 168 F. (2d) 199. Per curiam opinion dismissing appellant's appeal on the merits was filed May 6, 1949, but is not yet reported.

STATEMENT

The Brief of Amicus Curiae is filed by special leave of this Court and is on behalf of Keyes C. Gaynor, appellant in the case of *Gaynor v. Metals Reserve Company*, in which an appeal on the merits was submitted on the 9th day of March, 1949, to the United States Court of Appeals for the Eighth Circuit from the judgment of the United States District Court, of South Dakota on September 3, 1948, dismissing plaintiff's cause of action on the grounds that the allegations of plaintiff's amended complaint failed to state a claim upon which relief can be granted. The nature of plaintiff's cause of action is stated in the first paragraph of the opinion of the United States Court of Appeals, Eighth Circuit, in the reported opinion in 166 F. (2d) 1011.

The cause of action of the appellant, Gaynor, against the Metals Reserve Company was originally commenced in the Circuit Court of the State of South Dakota on March 30, 1945; was removed to the U. S. District Court of South Dakota on April 28, 1945, on petition of the Metals Reserve Company on the grounds that said suit is a suit of civil nature at law arising under the laws of the United States, and is a suit over which the District Courts of the United States are given original jurisdiction and the amount in controversy exceeds the sum of $3,000.00. That all of the stock of the Metals Reserve Company, a corporation incorporated under an Act of Congress, is owned by the Reconstruction Finance Corporation, and all of the stock of the Reconstruction Finance Corporation is owned by the United States. That the issues were made up at the June, 1946, term of the United States District Court of South Dakota, but was continued at the June, 1946, term because the defendant

had failed to file answers according to the rules of the Court. That in June, 1947, the defendant, Metals Reserve Company, filed a motion to abate the action because no substitution was made prior to July 1, 1946, under Public Law 109. This was the first knowledge plaintiff had of the passage of Public Law 109. No suggestion of the passage of the Act of Congress had been made by defendant prior to June, 1947, although the said defendant had filed motion in June, 1945, to dismiss on other grounds, which motion was submitted to the Court in September, 1945; answer was filed by Metals Reserve Company in June, 1946, too late under the rules for trial at the June, 1946, term, and the action was continued by consent of the defendant, Metals Reserve Company, until the June, 1947, term of said Court. The same attorney for the defendant, Metals Reserve Company, appeared at all times both in the District Court and the Appellate Court.

ARGUMENT

I.

The effect of the decision of this Honorable Court is to destroy the rights of the interested litigants in both the Eighth and Ninth Circuits without deciding that there was a conflict between the two Circuits, upon which certiorari was granted. The Court has decided questions not raised by any petition or brief and which affect the vested rights of litigants.

The Court in its opinion states:

> "We brought the case here on certiorari, 335 U. S. 857, because of alleged conflict with Gaynor v. Metals Reserve Company, 166 F. 2d 1011, in the Court of Appeals for the Eighth Circuit."

Outside of the above statement this Court never commented on the Gaynor case (166 F. (2d) 1011) in the Eighth Circuit or on the conflict with the case in the Ninth Circuit. Nor did it decide that there was no conflict. The effect of the decision on the rights of the litigant in the Eighth Circuit already has had its repercussions by a per curiam opinion filed in that Court on May 6, 1949, dismissing the appeal of the plaintiff on the grounds that the Court is without jurisdiction to review the merits of the case on appeal. The per curiam opinion referred to is based solely upon the decision herein upon which petition for rehearing is pending. It is significant that the Eighth Circuit per curiam opinion in the Gaynor case, after quoting from the decision of this Court, states:

> "As a result, on July 1, 1946, the action against Metals Reserve Company *'was at an end'* and this court is without jurisdiction to review the merits of the case on appeal. . . ."

The lifting from the opinion of this Court the words "was at an end" makes a finality to the rights of the litigant, Gaynor, without a hearing on his part or anyone representing him and without an opportunity to present cogent reasons against the decision as now rendered by the Supreme Court of the United States. Our position is that if a corporation "has enough life remaining to litigate its actions" then that our rights should not have been wiped out. If, on the other hand, the cause of action survives in Reconstruction Finance Corporation then we should have a right to proceed against that governmental agency on the basis of the cause of action.

The decision of the Supreme Court, which was granted on the basis that there was a conflict between the Eighth and Ninth Circuits, has now decided that the

Ninth Circuit was right and there was no jurisdiction in the Court of Appeals and that the Eighth Circuit was wrong in holding that they had jurisdiction to continue our action but at the same time it holds that the District Court in the Ninth Circuit had a right to enter a judgment after jurisdiction had expired by reason of the Act of Congress, *but that in the Eighth Circuit nothing could happen to preserve our rights.* Such holding leaves the whole situation in hopeless confusion as to the rights of litigants, which the Congress sought to preserve when it adopted the joint resolution. That the Congressional intent was to preserve our rights but place them in the hands of R. F. C. is shown by the discussion of Senator Taft before the Committee on Banking and Currency, S. J. Res. 65, 79th Cong., 1st Sess., page 2.

It was Senator Taft who urged "that contractors might not be in doubt, to have express statements that all liabilities and contracts of these corporations shall be passed on to R. F. C. and R. F. C. shall become responsible for them." (11. 10-11, Hearings before Senate Committee on Currency, 79th Congress, 1st Session.)

If our rights against Metals Reserve Company have lapsed for want of jurisdiction and because of the joint resolution, then our rights still should be preserved on the cause of action as against R. F. C. We should have been afforded a full hearing on the question before this Court's decision becomes final and irrevocable.

It is plain to see that the very result which Public Law 109 sought to avoid ("*No suit, action or other proceeding lawfully commenced by or against any of such corporations shall abate by reason of the enactment of this joint resolution*") has happened if the decision of the

Supreme Court is to be followed as shown by the Per Curiam opinion of the Eighth Circuit.

We would ask this Honorable Court to grant a rehearing in the *Defense Supplies Corporation v. Lawrence Warehouse* case and to permit the plaintiff and appellant, Keyes C. Gaynor in the *Gaynor v. Metals Reserve Company* case pending on appeal on the merits in the Eighth Circuit to intervene, or in the meantime to file a petition for Writ of Certiorari to this Court from the per curiam decision of the Eighth Circuit, rendered May 6, 1949, wiping out appellant's appeal on the merits (an order was entered May 18, 1949, in the Eighth Circuit giving the appellant, Gaynor, twenty days from the date of the final disposition of the Petition for Rehearing by this Court in the Lawrence Warehouse case to file a petition for rehearing from the Per Curiam opinion in the Eighth Circuit).

We would seek to have our cause (the Gaynor case) heard at the same time as the rehearing which may be granted in Defense Supplies Corporation, pursuant to authority of Section 1254 of the new Federal Judicial Code.

II.

The decision of this Honorable Court is contradictory because in the first part of its opinion the Court sustains the categorical part of Public Law 109, "that no action shall abate," and holds that the Court should not make the additional language "a proviso," but in the latter part of the opinion commands the Court to dismiss any appeals on the merits if substitution was not made before July 1, 1946.

The decision rendered by this Court in *Defense Supplies Corporation v. Lawrence Warehouse Company* in the

first part of the opinion is emphatic in holding that "The Statute states categorically that no action shall abate." Likewise the opinion "disagrees" with the decision in the Ninth Circuit and properly states:

> "If Congress states that no action shall abate, we fail to see why we should make additional language a proviso."

We respectfully submit that the second part of the Court's opinion contradicts the first part by making the additional language (the permissive part as to substitution) a *proviso* or *condition* as to action's continuange. It is the latter part of the Court's opinion in this respect of which we complain and particularly the statement "If Reconstruction Finance Corporation is not substituted within one year, the action by or against the Defense Supplies is, of course, at an end and they are left in statu quo." Reference to the per curiam opinion of the Eighth Circuit in the Gaynor-Metals Reserve case shows that that Court, in spite of their opinion in 166 F. (2d) 1011, adopts the opinion and the quoted language as "binding" and bases their dismissal of the Gaynor case on its merits solely upon the opinion in this Court. It would seem that the above statement, so far as the Gaynor case is concerned, should be regarded as dictum and not controlling.

Much is said of the cases of *LeCroine v. McAdoo*, 253 U. S. 217; *Payne v. Industrial Board*, 258 U. S. 613; and *Claussen v. Curran*, 276 U. S. 500, interpreting the Acts of 1899 and 1925. As pointed out in the opinion being considered by this Court

> "But in 1925 this statute was amended. The command, 'No action shall abate,' was omitted; the

new provision made it unmistakably clear that the validity of the judgment was conditional upon substitution."

As pointed out by this Court the 1925 statute lacked the mandatory declaration, present in Public Law 130, that pending litigation should not abate. And the survival of pending litigation was in the Act of 1925 specifically made conditional on timely substitution, whereas in Public Law No. 109 (the 1945 legislation) no language appears carrying such a condition for survival. This Court, as pointed out, has said that it will not make the "additional language a proviso."

It seems absolutely clear that the cited case of *United States ex rel. Claussen v. Curran*, 276 U. S. 590, is based upon the 1925 Act from which the teeth—"no action shall abate"—have been extracted.

The construction which the Courts have given to the 1899 and 1925 statutes (construed in the above cited cases) is not relevant to the instant case, particularly in the face of the categorical provision in Public Law 109 *against abatement*.

III.

The rule that dissolution of a corporation abates a pending action against the corporation is not applied in case of a merger and consolidation of a corporation with another corporation or on dissolution of a corporation, where the purpose of the merger or dissolution was to transfer the functions and assets of the one corporation to the other corporation together with an assumption of the liabilities by the transferee. Equitable considerations and public policy in such cases prevent abatement.

1 C. J., p. 134, Sec. 214.

Amer. Jur., p. 58, Sec. 55.

Oklahoma Natural Gas Co. v. Oklahoma, 273 U. S. 257, at p. 261.

Report of Hearing; Senate Journal Resolution 65, May 15, 1945, before Committee on Banking and Currency, U. S. Senate, U. S. Gov't Printing Office, May 15, 1945, bottom of p. 10 and top of p. 11 of said Report.

The effect of Public Law 309 was a merger or consolidation of the corporation, Defense Supplies Corporation, and the corporation, Metals Reserve Company, with the Reconstruction Finance Corporation which under the law owned all the stock in the designated Corporations. Report of Hearing on Senate Resolution 65, May 15, 1945.

In case of a merger and consolidation of a corporation, which is party to a pending action with another corporation or on dissolution of a corporation the pending action does not abate and liability cannot be escaped. This, we believe, is another modification or relaxation of the harsh rule of the Common Law that dissolution abates a pending action. Moreover, even in the absence of a statutory provision with reference to merger, it is held by the weight of authority that pending actions, whether by or against a corporation, do not abate by reason of its merger or consolidation with another corporation. 1 Am. Jur., page 58, Section 55.

Where the statute with reference to merger of corporations provides that the merger *shall not abate* pending actions, or the new corporation may be substituted as a party, such substitution is optional and not necessary, and the action may proceed without it. 1 C. J., page 134, Section 214. Also see *Edison Elec. Light Co. v. Westing*

house, 34 Fed. 232 at page 233, and *Edison Elec. Lt. Co. v. U. S. Electric Lighting Co.*, 52 Fed. 300 at page 314 (9), which cases are cited in the *Oklahoma Natural Gas Co. v. Oklahoma* case, supra.

We submit that the decision under consideration on this petition for rehearing not only fails to recognize the general rule applied in case of merger to pending litigation, but permits the transferee corporation to escape a liability which Public Law 109 requires it to assume.

IV.

Under the laws of California and the State of South Dakota no surviving or continuing action abates by transfer of any interest, and revivor is a matter of right without any limitation of time. The State statute governs in the Federal Courts.

Section 33.0414, South Dakota Code of 1939.

Winslow v. Domestic Eng. Co., 20 F. Supp. 578.

United States ex rel. Johnson v. Morley Constr. Co., (2d Cir.), 98 F. (2d) 781, at page 785.

Guaranty Trust Co. of N. Y. v. York, 326 U. S. 99, at page 113.

Erie R. R. Co. v. Tompkins, 304 U. S. 817, at page 823.

Klaxon v. Stentor Elec. Co., 313 U. S. 1020, at page 102.

Cloquet Lbr. Co. v. Burns (8th Cir.), 222 Fed. 857, at page 862.

Westwater v. Murray (6th Cir.), 245 Fed. 427, at page 434.

Cyclopedia of Federal Procedure, 1939 Supp., Section 1328, Note, page 816.

U. S. C. A., Title 28, Section 724 (Federal Conformity Act).

Plaintiff's cause of action was a continuing action lawfully commenced under the laws of the State of South Dakota and was not an action brought under any Federal Statute. Section 33.0434, South Dakota Code of 1939, provides:

> "No action shall abate by the death or other disability of a party, or by transfer of any interest therein if the cause of action survive or continue.
>
> "In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

The California Statute is similar to the South Dakota Statute.

Under the above Statute of the State of South Dakota the present action of plaintiff in the Gaynor case survived or continued after any transfer or succession of interests by reason of the enactment of Public Law No. 109 and did not abate. Under the laws of the State of South Dakota the matter of revivor of an action is a matter of right without any limitation of time. A similar situation exists in California.

The rights and obligations governing the transactions involved in the Gaynor case were created under the laws of the State of South Dakota. The right of plaintiff to recover was derived from the State of South Dakota, not from the United States. If the plaintiff Gaynor could maintain his action under the laws of the State of South Dakota he still ought to be allowed to recover in a Federal Court. The State Statute governs in Federal Court.

United States ex rel. Johnson v. Morley Constr. Co. (2d Cir.), 98 F. (2d) 781, at page 785.

Guaranty Trust Co. of N. Y. v. York, 326 U. S. 99, at page 113.

Erie R. R. Co. v. Tompkins, 304 U. S. 817, at page 823.

Klaxon v. Stentor Elec. Co., 313 U. S. 1020, at pages 1021-1022.

In the case of *Cloquet Lumber Co. v. Burns* (8th Cir.), 222 Fed. 857, at page 862, the Court held that under Gen. St. Minnesota, 1913, Section 7685, under which statute no action shall abate by reason of the transfer of interest of a party, if the cause of action continues or survives (identical to the South Dakota statute above referred to), the motion of defendant to dismiss on account of transfer of interest of the plaintiff was properly overruled, as the correct procedure was for plaintiff to move for a substitution of parties and in the absence of plaintiff moving for defendant to move for substitution, especially as defendant's counsel had a copy of the assignment for two years before motion by defendant to dismiss was made. The case had been continued under the name of the original plaintiff. Speaking for the Court, the late Justice Carland said:

> "Considering that the copy of the assignment had been in hands of counsel for two years, a motion to dismiss at the trial had little to commend it to the equitable consideration of the court."

To the same effect is the case of *Westwater v. Murray* (6th Cir.), 245 Fed. 427, at page 434 (7), citing the above case of *Cloquet Lumber Co. v. Burns*, and holding under the Ohio Statute of revivor that the case could be prosecuted to the end either in the name of the transferor (the original party) or in that of the transferee if substitution had been made.

There is no direct conflict between the statute of South Dakota, above cited, and Public Law No. 109, and under the Federal Conformity Act (U. S. C. A., Title 28) the State statute should govern.

The point raised above is fully discussed in the opinion in the case of *Gaynor v. Metals Reserve Co.* (8th Cir.), 166 F. (2d) 1011, at pages 1015 and 1016. The opinion of this Court fails to take into consideration the effect of the South Dakota and California statutes and the rights accruing to litigants thereunder. Likewise this Court's decision fails to apply the Federal Conformity Act (U. S. C. A., Title 28, Section 724).

V.

Public Law 130 was not intended to repudiate any lawful debt or liability or to disturb any vested right.

Gaynor v. Metals Reserve Company, 166 Fed. (2d) 1011, at page 1014.

The right of the plaintiff in the Gaynor case to try on the merits his cause of action, lawfully commenced in the State Court of the State of South Dakota on March 30, 1945, at issue before July 1, 1946, and its trial continued with the consent of the Metals Reserve Corporation before July 1, 1946, was a vested right which the framers of Public Law 109 in Congress did not intend to repudiate or destroy. We quote from the opinion in *Gaynor v. Metals Reserve Company*, 166 F. (2d) 1011, at page 1014.

> "However, under the statutes providing that a dissolution shall not impair rights previously vested, the right to sue or be sued on obligations previously incurred survive the dissolution. We think it important to observe that the act provides specifically

that, 'No suit, action or other proceeding lawfully commenced by or against any such corporation shall abate by reason of the enactment of this joint resolution.' The congressional history plainly indicates that it was the purpose of Congress to protect all vested rights by this positive declaration that the dissolution of the corporation should not disturb such vested rights nor that any action lawfully commenced should be abated. It was not the intention of Congress to repudiate any just debt or liability theretofore incurred."

The opinion of this Court, although it protects a judgment in favor of the transferee under Public Law 109 in a pending cause of action wipes out a hearing on the merits of a just debt or liability upon which an action at law was pending before the passage of the Act of Congress and which had not been reduced to judgment. Under the facts and circumstances shown the interested litigants in the Eighth and Ninth Circuits are entitled to their days in Court on the merits of their causes of action.

The litigants involved are entitled to a rehearing in this Court clarifying and settling the matter of vested rights.

VI.

A pendente assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned.

Ex Parte Railroad, 95 U. S. 221.

Under Public Law 109 all the assets and liabilities of every kind and nature of the designated corporations (including Defense Supplies Corporation and Metals Re-

serve Company) were transferred to the Reconstruction Finance Corporation and were to be performed, exercised, and administered by that Corporation in the same manner and to the same extent and effect as if originally vested in the Reconstruction Finance Corporation. One of these assets was the cause of action against the respondents herein and one of those liabilities was the right of action of the litigant, Gaynor, against the Metals Reserve Company.

Under the opinion of this Court in the case of *Ex Parte Railroad*, 95 U. S. 221, the Court said:

> "It is well settled that an assignment by a defendant, of his interest in a litigation, does not necessarily defeat a suit. His assignee, taking *pendente lite*, is bound by what is done against him. The assignee may at his own election, come in by an appropriate application, and make himself a party, so as to assume the burden of the litigation in his own behalf, or he may act in the name of his assignor. A *pendente lite* assignment carries with it an implied license by the assignor for the use of his name in the cause by the assignee to protect the rights assigned. Of this, the plaintiffs in the action cannot complain because the assignee is bound by all that is done, whether a party by name or not."

It is difficult to square the reasoning in the above cited case with the result announced in the case now before the Court.

The opinion last referred to is approved in the opinion by the late Chief Justice Taft in the case of *Oklahoma Natural Gas Co. v. State of Oklahoma*, 273 U. S. 257, with the comment:

"It may be that with the disclosure of all the facts and circumstances we may find that what was done with the consent of all the parties to this suit is in fact a novation which we can make effective."

It should be remembered in the Gaynor case that the cause of action was based on an action for the balance claimed to be due for mica sold and delivered and for damages for breach of contract for the sale of mica; that it was commenced in the State Court of South Dakota in March, 1945, and was not based on any Federal Statute and that the action removed to the U. S. District Court of South Dakota in April, 1945, was *pendente lite* at the time (July 1, 1945) of the passage of Public Law 109. The California action in the instant case was also pending litigation on July 1, 1945.

We submit that this Court's decision is contrary to the rule announced in both the above-referred to cases.

VII.

The word "shall" is ordinarily "the language of command," while the word "may" implies a "permissive" act as used in special contradistinction to the word "shall" used in a mandatory sense in the same legislative act.

Anderson v. Youngkau, 329 U. S. 482.

Hood, Com'r of Banks of N. Car., v. Bell (1st Cir.), 84 F. (2d) 136.

The above quoted clause from Public Law No. 109 that no action lawfully commenced shall abate is mandatory in effect and its language in this respect with the use of the word "shall" is that of "command". Imperative

in effect, it allows no discretion in its application. It creates and amounts to a legislative mandate that "no suit, action or proceeding . . . shall abate by reason of the enactment of this joint resolution." The recent case of *Anderson v. Youngkau* in the United States Supreme Court, reported in 67 S. C. R. 428, at page 430, which is here referred to on the meaning of the word "shall", discusses the use of the word "shall" as used in Rule 25a of the Rules of Civil Procedure, which rule provides that if a party dies and the claim is not thereby extinguished the Court, within two years after the death, may order substitution of the parties, but if substitution is not so made "the action shall be dismissed." In that case the use of the word "shall" was pronounced as "the language of command" and "mandatory". In Public Law No. 109 there is no clause, as there was in Rule 25a, that if substitution is not so made "the action shall be dismissed." Neither is there any such provision as to dismissal in Rule 25c (F. R. C. P.), where a transfer of interests is made during pending litigation.

The distinction between Rule 25a, as it formerly existed, and Rule 25c should be kept in mind.

The dissenting opinion of Mr. Justice Rutledge in the case of *Anderson v. Youngkau*, supra, discusses the many difficulties and injustices which had arisen by virtue of rigid time limitations, whether laid by statute, rule of Court, or judicial decision, and refers to the work of the Committee which drafted the Rules of Federal Procedure and their action in re-drafting Rule 25a so as to avoid injustices by the rigid time limitation formerly found in that rule.

The remaining clause of Section 2 of Public Law No. 109,

> "but the court, on motion or supplemental petition, petition filed at any time within twelve months after the date of such enactment, showing a necessity for the survival of such suit, action or other proceeding to obtain a determination of the questions involved, may allow the same to be maintained by or against the Reconstruction Finance Corporation,"

is not mandatory and clearly does not negative, qualify, or override the positive and mandatory declaration contained in the preceding clause of said section of the law that "no suit . . . shall abate by reason of the enactment of said joint resolution."

In the case of *Hood, Com'r of Banks of N. Car., v. Bell* (1st Cir.), 84 F. (2d) 136, at page 138, the Court had before it the interpretation of the North Carolina statute, Section 461, Code of North Carolina, 1935, in reference to the survival of pending actions where there had been a transfer of interest. The language used in the North Carolina statute was quite similar to the language employed in Public Law No. 109. At page 138 of the opinion Justice Parker, speaking for the Court, said:

> "The use of the word 'may' in the last clause of the statute was not intended, we think, to confer on the court a discretion to dismiss the action in the teeth of the provision that the action should not abate by a transfer of interest, but merely a discretion to substitute the transferee as a party instead of continuing the action in the name of the original party."

As stated in the case of *Anderson v. Youngkau*, supra, the Court said:

"When the same Rule uses both 'may' and 'shall' the normal inference is that each is used in the normal sense—the one being 'permissive' and the other 'mandatory'."

VIII.

The decision of this Court is contrary to Rule 25c of the Federal Rules of Civil Procedure.

Gaynor v. Metals Reserve Company, 166 Fed. (2d) 1011, at page 1015.

United States ex rel. Johnson v. Morley Construction Co., 98 F. (2d) 781, at page 785 (6.7).

Cyclopedia of Federal Procedure, Section 1328 (see Note, middle of page 816).

U. S. C. A., Title 28, Section 724.

Davis v. Rudolph (Cal.), 181 P. (2d) 765, at page 768.

Rule 25c of the Federal Rules of Civil Procedure was combined and adapted from Section 83, New York Civil Procedure Act, 1937, and the California Code of Civil Procedure (Deering 1937, Section 385). (See Note to Subdivision (c), Title 28, Rule 25c, U. S. C. A. 540.)

In a recent California case the Court, in construing said section of the California statute, said:

"If no substitution is asked for, the case will go on in the name of the original party as if no transfer had been made; and to have it do so, no application or action is necessary."

Davis v. Rudolph, 181 P. (2d) 765, at page 768 (2).

The New York statute is almost identical with Rule 25c. This Court is referred to the opinion of Justice L. Hand in *United States ex rel. Johnson v. Morley Construction*

tion Co. (2nd. Cir.), 98 F. (2d) 781, at page 785 (6,7); cert. denied, 305 U. S. 651.

The case of *Gaynor v. Metals Reserve Company*, 166 F. (2d) 1011, at page 1015, also discusses the application of Rule 25c, Federal Rules of Civil Procedure.

Inasmuch as there is no direct conflict between Rule 25c and the South Dakota statute above referred to, the Federal Conformity Act (U. S. C. A., Title 28, Section 724) is applicable and the State statute should govern.

Certainly there was no intention of Congress in passing Public Law 109 to abrogate Rule 25c or violate the State statutes governing transfers of interest during litigation.

IX.

The language used in the statute does not require substitution.

The first clause of Section 2 of said joint resolution is not followed by a conditioning conjunction or words such as "if" or "provided". It is followed by the word "but", which word is used variously as an adverb, conjunction, and preposition and has a variety of meanings. None of the accepted meanings of the word "but" when used with the word "may", as is done in the clause in question, give it a conditioning or limiting sense as "provided". More often the word "but" is used in the sense of "and", "even if" and "however". None of these meanings of the word "but" would permit the latter clause to override the first clause.

X.

The liability of a named corporation under Public Law 109 was not extinguished under Public Law 109.

Troustine v. Bauer, Pogue & Co., 44 Fed. Supp. 767, at page 771 (7); affirmed, 144 Fed. (2d) 379 (2nd Cir.).

James & Co. v. Second Russian Ins. Co., 239 N. Y. 248, 254, 146 N. E. 369, 370.

The attention of the Court is called to the cases of *Troustine v. Bauer, Pogue & Co.* (D. C., S. D. N. Y.), 44 Fed. Supp. 767, at page 771, and *James & Co. v. Second Russian Ins. Co.*, 239 N. Y. 248, 254, 146 N. E. 369.

CONCLUSION

In order that the rights of litigants may be clarified and injustices as shown be prevented, we submit that a rehearing should be granted.

Respectfully submitted.

H. C. Harper,
Attorney for Amicus Curiae.

Francis J. Parker,
Robert B. Pike,
Of Counsel.